vit referred to in the summons-in-chambers that the evidence sought to be admitted was highly contentious. The application was made under O 38 r 2 of the Rules of the High Court 1980 and for the purpose of this appeal it is best to see the scope and object of the rule.

Since the claim is based on a guarantee, the liability of the guarantor will depend very much on the language of the instrument and among other things the appellant is entitled to rely on the rule reiterated in *Schuler AG* v *Wickman Tool Machine Sales Ltd*[1] at p 261:

> The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

It is an old principle echoed by Lord Morris in *Bank of Australasia* v *Palmer*[2] (at p 545) that '... parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract'.

Evidence in the nature sought to be admitted in the said affidavit is only admissible on the terms of s 92 of the Evidence Act 1950 dealing with the admissibility of oral evidence or statement where there is a contemporaneous or collateral separate oral agreement on which a document is silent. The admissibility should be determined at the trial, not at an interlocutory stage such as this. Order 38 r 2 deals with a procedure of admitting affidavit evidence and does not deal with admissibility of the evidence.

Under O 38 r 2 a wide discretion is given to the court at or before a trial begun by writ whether the court should make an order that the affidavit of any witness may be read at the trial. The rule clearly says that the court may exercise the discretion according to the circumstances of the case and whether it is reasonable to make such an order.

Order 38 r 2 is taken from the equivalent English rule. This rule is used normally for a witness who is abroad and therefore not available for the trial or where the evidence is uncontested. An order under O 38 r 2 should not be made if the evidence is strongly contested, or where the evidence relates closely to the credibility of the witness, or where by its very nature the evidence needs to be examined closely and its very admissibility yet to be determined.

In our view it is not a proper exercise of discretion to allow evidence under O 38 r 2 where the evidence is highly contentious and its admissibility is in issue.

Appeal allowed.

Solicitors: *Nga Hock Cheh & Co; Sault & Co.*

Reported by *Prof Ahmad Ibrahim*

Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-50 OF 1990
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
11 SEPTEMBER 1990

Companies & Corporations — Transfer of shares in company — Absolute discretion of directors to register transfer of shares — Articles of association of company

In this case the respondents had applied to have their names registered as owners of certain shares which had been transferred to them. At the time of the transfer of the shares the respondents were already owners of other shares in the company and were therefore members of the company. The directors of the company refused to register the transfer in exercise of their discretion under art 44(1) of the articles of association of the company. The respondents applied to the High Court for rectification of the register of members of the company by having their names registered as owners of the shares. The learned judge of the High Court ruled in favour of the respondents [see [1990] 2 MLJ 167], holding that the said art 44(1) has no general application and in particular has no application to a transfer from a member to another member.

Held, allowing the appeal:
In this case the discretion given by the article is by its language absolute. The court should not interfere with the proper exercise of discretion by the board of directors conferred by the articles of association to refuse registration for the well-being of the company. Indeed the court should be slow to question the exercise of the discretion in the absence of evidence that the board of directors had acted mala fide.

[Bahasa Malaysia summary

Di dalam kes ini responden-responden telah membuat permohonan supaya nama mereka didaftarkan sebagai pemunya saham-saham yang telah dipindahkan kepada mereka. Pada masa pemindahan itu mereka adalah pemunya saham-saham lain di dalam syarikat itu dan oleh kerana itu adalah ahli syarikat itu. Pengarah-pengarah syarikat itu telah enggan mendaftarkan pemindahan itu dengan menjalankan budibicara mereka di bawah perkara 44(1) perkara-perkara persatuan syarikat itu. Responden-responden telah memohon kepada Mahkamah Tinggi mendapat pembetulan daftar ahli syarikat itu dengan mendaftarkan nama mereka sebagai pemunya saham-saham itu. Hakim Mahkamah Tinggi telah membuat keputusan bagi responden-responden [sila lihat [1990] 2 MLJ 167], kerana beliau berpendapat perkara 44(1) yang tersebut itu tidak boleh dipakai secara am dan khususnya ia tidak dipakai mengenai pemindahan dari seorang ahli kepada ahli lain.

Diputuskan, membenarkan rayuan:
Di dalam kes ini budibicara yang diberi oleh perkara itu adalah mengikut perkataannya mutlak. Mahkamah tidak seharusnya mengganggu penggunaan dengan cara yang betul oleh lembaga pengarah budibicara yang diberi oleh perkara-perkara persatuan untuk enggan mendaftarkan pemindahan demi kebaikan syarikat itu. Sesungguhnya mahkamah hendaklah berhati-hati menyoal penggunaan budicara itu tanpa apa-apa keterangan yang menunjukkan lembaga pengarah itu telah bertindak mala fide.]

Cases referred to

1 *Re Tahansan Sdn Bhd* [1984] 1 MLJ 204 (refd)
2 *Re Dublin North City Milling Co* [1909] IR 179 (refd)
3 *Kesar Singh* v *Sepang Omnibus Co Ltd* [1964] MLJ 122 (refd)
4 *Re Smith & Fawcett Ltd* [1942] 1 All ER 542 (refd)
5 *Mohan a/l Paramsivam* v *Sepang Omnibus Co Sdn Bhd* [1989] 1 MLJ 247 (folld)

Appeal from: Originating Summons No D3-31-115-88 (High Court, Kuala Lumpur)

Cecil Abraham for the appellants.
Porres Royan for the respondent.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The respondents had by originating summons applied to the High Court for rectification of the register of members of the appellant company, Kwality Textiles (M) Sdn Bhd ('the company') by having their names registered as owners of certain shares that had been transferred to them. At the time of the transfer of the said shares the respondents were already owners of other shares in the company and therefore were already members of the company.

The directors of the company refused to register the transfer purportedly in exercise of their discretion under art 44(1) of the articles of association of the company. The said art 44(1) reads as follows:

> The directors may in their *absolute discretion* without assigning any reason refuse to register any transfer of shares to *a person of whom they shall not approve* and they may also refuse to register any transfer of shares on which the Company has a lien.

As will be seen later the words emphasized are quite material to the appeal.

After hearing the parties the learned judge of the High Court ruled in favour of the respondents for reasons set out in his grounds of decision. [See [1990] 2 MLJ 167.]

The trial judge framed the principle issue before him thus — does the said art 44(1) have a general application or is it of limited application? He held that the said art 44(1) has no general application and in particular has no application to a transfer from a member to another member which is the case here. That issue forms the crux of the grounds of decision and having construed art 44(1) in the manner he did the learned judge held that the directors of the company had no discretion to refuse to effect a transfer of shares from one member to another. Since the learned judge held that there was no discretion to refuse to register the transfer the question of any contravention of the Industrial Coordination Act 1975 becomes a secondary issue. It may also be mentioned in this regard that the learned judge in his grounds of decision said he agreed with the reasoning in *Re Tahansan Sdn Bhd*[1] where Chan J stated that the court will not countenance the going back on an agreement binding on a company even if thereby there is a real danger of the company losing its manufacturing licence.

The learned judge here held that art 44(1) does not apply to transactions to which art 43 applies. Articles 42 and 43 read as follows:

> 42 If the company shall within the space of 28 days after being served with such notice find a member (hereinafter called 'the purchasing member') willing to purchase the share and shall give notice to the proposing transferor, he shall be bound, upon payment of fair value, to transfer to the purchasing member.
>
> 43 If the company shall not within the space of 28 days aforesaid find a member willing to purchase the share and give notice in manner aforesaid, the proposing transferor shall at any time within six months afterwards be at liberty to sell and transfer the share to any person at any price.

The first thing to note in a situation like the present one is that there is nothing in law to limit the restrictions which a company's articles may impose on the right of transfer. Shares are a form of property connected with an association of members and in some companies the identity of members of the company may be important and as a result the memorandum of articles of the association of a company may in the interest of all members impose restrictions in the transfer of shares. In *Palmers' Company Law* (24th Ed), the author says at p 616:

> There is nothing to limit the restrictions which a company's articles may place on the right of transfer. The articles may give the directors power to refuse to register a transfer in any specified cases, for instance, where calls are in arrear, or where the company has a lien on the shares, and some such provisions are usually inserted. Commonly the articles provide that the directors may decline to register any transfer of a share (not being a fully paid share) to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. But the articles in many cases go far beyond this. They may prohibit, for example, the transfer of a share to any person who is not a member of a specified class, or provide, as they often do in private companies, that before transferring to an outsider the intending transferor must first offer the shares to the other members, and give them a right of pre-emption.

Article 44(1) provides that the directors may in their *absolute discretion* without assigning any reason refuse to register *any* transfer of share to *a person of whom they shall not approve*. It is clear at least from the language used that the discretion is exercisable in respect of any transfer of shares, be it from member to member or member to non-member and the directors may refuse to register any transfer to a person (whether a member or not) of whom they do not approve. This construction is in fact supported by *Re Dublin North City Milling Co*[2] where it was held that where the directors are given absolute discretion to refuse to register any transfer of shares (as in art 44(1) in the instant case), that article is always construed so as to apply to every new proposal for a transfer of share and the

fact that a transferee is already registered as a member makes no difference. The relevant article in the *Dublin* case[2] reads:

> The directors, on behalf of the company, *may decline to register any transfer of share* not in the prescribed form, or whilst the member making the same is either alone or jointly with any other person indebted to the company on any account whatever, *or unless the transferee is approved of by the board.* (Emphasis provided.)

The Master of the Rolls in *Dublin*[2] said at p 184:

> My considered judgment is that under these articles the duties of the directors as regards approval or disapproval arise on every fresh transfer of shares, and that, under these articles, the mere fact that the proposed transferee is already a shareholder does not and cannot diminish their powers, or lessen their obligations, 'on behalf of the company', in respect of 'any transfer of shares'

Another thing to remember with regard to this type of cases is the principle involved in the exercise of the discretion given to the board of directors and to what extent the court should interfere with the exercise of the discretion. Here the discretion conferred by art 44(1) is by its language absolute. In *Kesar Singh* v *Sepang Omnibus Co Ltd*[3] Ismail Khan J (as he then was) had a similar article of association of a company posed before him. The article there read as follows:

> The right of members to transfer their shares shall be restricted as follows:
>
> (a) No share shall be transferred to a person who is not a member so long as any member or any person selected by the directors as one whom it is desirable in the interests of the company to admit to membership is willing to purchase the same at the fair value.
> (b) The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares.

The learned judge in *Kesar Singh*[3] found that the directors acted in good faith, in the interests of the company and with due regard to the shareholder's right to transfer his shares. The learned judge then came to the conclusion that the registration of the transfer of the said shares was properly refused. At p 123 the learned judge said:

> The principles to be applied in cases where the directors are given by the articles of association of a company a discretion with regard to the acceptance of shares are set out in the case of *Re Smith & Fawcett Ltd* [1942] 1 All ER 542.

In this context it may be useful to reproduce the speech of Lord Greene in *Re Smith & Fawcett Ltd*[4] which appears at p 543:

> The principles to be applied in cases where the articles of association of a company confer a discretion on directors with regard to the acceptance of transfers of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider — not what a court may consider — to be in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles upon their true construction permit them to take into consideration. In construing the relevant provisions in the articles, it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases ... The right, if it is to be cut down, must be cut down with satisfactory clarity. *It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true construction permit.* (Emphasis provided.)

In *Mohan a/l Paramsivam* v *Sepang Omnibus Co Sdn Bhd*,[5] the learned judge there, Siti Norma Yaakob J was confronted with a somewhat similar problem as George J in this case. In *Mohan*[5] the question was whether the court should interfere with the discretion of the board of directors and order rectification of the register because the board of directors had unanimously decided to reject the transfer as the transfer would affect the bumiputra equity in the company. The learned judge there dismissed the application holding that the directors' refusal to register the share transfer was based on the composition of the shareholders and the percentage of their holdings as bumiputras and non-bumiputras and it cannot therefore be said that the directors had exercised their decision mala fide.

The learned judge here purported to follow the rationale in *Re Tahansan Sdn Bhd.*[1] However, if one looks at the written judgment of Chan J in that case the distinction is clearly drawn because what the judge found there was that the problem 'is more imagined than real. The question whether there is a possibility of losing the licence or both the licences is purely an academic one. That that is so is because I have already ordered a winding up on the just and equitable ground. The company is in liquidation. They do not need the licences any more. It did not matter a lot if they were cancelled.'

In the present case here it is clearly stated in the cross-examination of the managing director of the company that at the material time the non-Malaysian shareholding of the company was more than 51% and that there was a breach of the condition of the manufacturing licence under the 1975 Act. It was also made clear that the application for the extension of the exemption was refused by the government. There was thus a real likelihood of the appellant company losing its manufacturing licence if the registration was allowed.

We are of the view that the learned judge in *Mohan*[5] adopted a more correct approach to the function of the court in an application to seek the court's discretion to rectify the register of members of a company.

The court should not interfere with the proper exercise of discretion of the board of directors conferred by the articles of association to refuse registration for the well being of the company. Indeed the court should be slow to

question the exercise of the discretion in the absence of evidence that the Board of Directors had acted mala fide.

For the above reasons we allow the appeal with costs here and below. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Shearn Delamore & Co; Shook Lin & Bok.*

Reported by *Prof Ahmad Ibrahim*

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-39 OF 1989
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND JEMURI SERJAN SCJJ
20 AUGUST 1990

Administrative Law — Natural justice — Breach — Disciplinary action against civil servant — Show cause letter sent to civil servant including charge — Whether necessary to give grounds — Public Services Commission taking into account civil servant's past conduct without giving her opportunity of being heard — Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969, regs 27 & 30 — Federal Constitution, art 135(2)

Constitutional Law — Natural justice — Breach — Disciplinary action against public officer — Federal Constitution, art 135(2)

In this case the appellant, a book-binder with the Government Printing Department, was dismissed by the Public Services Commission after she was found guilty of negligence and dereliction of duty. She subsequently applied to the High Court for a declaration that her dismissal was null and void and for other ancillary orders. Her application was dismissed in the High Court and she appealed. The core of the appellant's complaint was the fact that the Public Services Commission in arriving at its decision to dismiss her from service had taken into account extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department to the Public Services Commission without giving her an opportunity to explain, contradict or rebut them.

Held, allowing the appeal:

(1) Although the show cause letter included a charge and not the grounds as required by reg 30(2) of the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969, this was a matter of form rather than of substance. The charge contained all the necessary grounds for the proposed dismissal which enabled the appellant to prepare her written representation in reply.

(2) The first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities cited in the judgment, the court had no alternative but to allow the appeal.

[Bahasa Malaysia summary

Di dalam kes ini, perayu, seorang penjilid buku dengan Pejabat Pencetak Kerajaan, telah dibuang kerja oleh Suruhanjaya Perkhidmatan Awam selepas ia didapati bersalah cuai dan mengabaikan tugas. Dia telah kemudiannya memohon kepada Mahkamah Tinggi untuk mendapat deklarasi bahawa pembuangan kerjanya itu adalah tidak sah dan terbatal dan untuk perintah-perintah bersampingan. Permohonannya telah ditolak di Mahkamah Tinggi dan dia telah merayu. Intisari aduan perayu ialah bahawa Suruhanjaya Perkhidmatan Awam apabila membuat keputusan untuk membuang kerjanya telah mengambil kira perkara-perkara tidak tergolong iaitu rekod kelakuannya dahulu yang telah dicatatkan di dalam rekod perkhidmatannya dan yang telah dikemukakan oleh Ketua Pengarah Pejabat Pencetak Kerajaan kepada Suruhanjaya Perkhidmatan Awam tanpa memberinya peluang untuk menjelas, menyangkal atau menafikan perkara-perkara itu.

Diputuskan, membenarkan rayuan itu:

(1) Sungguhpun surat meminta memberi sebab yang diberi kepada perayu mengandungi tuduhan dan bukan alasan-alasan seperti yang disebut di dalam Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Perintah-Perintah Am Bab 'D') 1969, ini adalah perkara bentuk dan bukan perkara pokok. Tuduhan itu mengandungi semua alasan yang perlu untuk pembuangan kerja yang dicadangkan yang membolehkan perayu menyiapkan jawapan bertulisnya.

(2) Responden pertama telah melanggar kaedah keadilan asasi oleh kerana tidak memberi perayu peluang menjelas atau menafikan rekod perkhidmatannya yang telah digunakan dan berkesan menyebabkan keputusannya untuk mengenakan hukuman yang seberat-beratnya yang dibenarkan di bawah Peraturan-Peraturan 1969 itu. Atas alasan ini dan atas autoriti-autoriti yang disebutkan di dalam penghakimannya, mahkamah tidak ada pilihan lain selain daripada membenarkan rayuan itu.]

Cases referred to

1 *Surinder Singh Kanda* v *Government of the Federation of Malaya* [1962] MLJ 169 (folld)
2 *R Sambasivam* v *Public Services Commission & Anor* [1971] 2 MLJ 181 (refd)
3 *Inspector-General of Police & Anor* v *Alan Noor bin Kamat* [1988] 1 MLJ 260 (refd)
4 *Board of Education* v *Rice* [1911] AC 179 (refd)
5 *Council of Civil Service Unions & Ors* v *Minister for the Civil Service* [1955] 1 AC 374 (refd)
6 *Mahadevan* v *Anandarajan & Ors* [1970] 1 MLJ 50 (refd)
7 *Ridge* v *Baldwin* [1964] AC 40 (refd)
8 *R* v *Smith* (1844) 5 QB 614 (refd)
9 *S Nanjundeswar* v *State of Mysore* AIR 1960 SC 159 (folld)
10 *R* v *Home Secretary, ex p Benwell* [1985] 1 QB 544 (folld)
11 *Ramachandra Gopalrao* v *Deputy Inspector General of Police* AIR 1957 Madh 126 (folld)
12 *Chief Constable of North Wales Police* v *Evans* [1982] 3 All ER 142 (refd)
13 *Board of Trustee of Maradona Mosque* v *Badiuddin Mahmud & Anor* [1967] AC 13 (refd)
14 *R* v *Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 (refd)